United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM REID and WILBUR P. REID, Partners
Doing Business Under the Firm Name and
Style of National Cold Storage
& Ice Company,
Plaintiffs in Error,

vs.

H. A. BAKER,
Defendant in Error.

Brief of Plaintiffs in Error

Upon Writ of Error to the United States District Court for the District of Oregon.

J. F. BOOTHE, Esq.,
Attorney for Plaintiff in Error.

CLARK, MIDDLETON, CLARK & SKULASON,
Of Counsel for Plaintiffs in Error.

CAREY & KERR, and OMAR C. SPENCER,
Attorneys for Defendant in Error.

F. W. BALTES AND COMPANY, PRINTERS

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Note: At the time this brief was prepared and printed the transcript had not been printed, and printed copy was not before counsel for plaintiff in error, hence pages of transcript referred to are left blank and will be filled before argument of case.

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STATEMENT OF THE CASE

This case arises upon a writ of error to the District Court for the District of Oregon upon a judgment rendered in that Court upon verdict of the jury, and brings here for review the action of that Court on rulings in respect of the admission of evidence and overruling a motion for a directed verdict made by the plaintiffs in error.

The defendant in error, H. A. Baker, plaintiff in the Court below, brought this action against the plaintiffs in error, defendants in the Court below, in the District Court for the District of Oregon. The amended complaint alleged the necessary diversity of citizenship and the jurisdictional amount in controversy. It was further alleged that during the months of July and

August, 1920, Baker was the owner of 398 barrels of loganberries, weighing 170,156 pounds, and during said months delivered to and stored the berries with the plaintiffs in error; that the plaintiffs in error accepted the berries for storage, and undertook and agreed to store and keep them in proper state of refrigeration so that the same would not ferment or deteriorate, for which the defendant in error agreed to pay certain storage rates; that the plaintiffs in error failed and neglected to keep the berries in a proper state of refrigeration; that the temperature of the storage room where the berries were stored was permitted to go above the freezing point, so that the berries fermented, as a result of which they became worthless and their market value was destroyed; that the berries were to be removed from the place of storage by the defendant in error, during the Fall of 1920; that during said time the market value of the loganberries, had they been kept in a proper state of refrigeration, was seventeen and one-half (17½c) cents per pound; that the loganberries were not removed by the defendnat in error in the Fall of 1920 because their market value had been destroyed. It is not alleged that they were ever thereafter taken out of the possession of plaintiffs in error, and it appears from the evidence given on the trial that they were not. The amended complaint further alleges that the defendant in error has been damaged to the full amount of the alleged market value of the berries, to-wit, 17½ cents per pound for the 398 barrels, or 170,156 pounds mentioned in the complaint.

It will be observed that the complaint states that 398 barrels of loganberrie, containing a specified num-

ber of pounds, were delivered to and stored with the plaintiffs in error in July and August, 1920, and that these were damaged and the value destroyed by alleged lack of refrigeration. It is for the damage to this specified quantity, and this quantity alone, that this action was brought. There is no allegation or suggestion in the amended complaint that any other berries were delivered for storage by the defendant in error to the plaintiffs in error, or that any other berries stored by him were damaged by lack of refrigeration or other cause.

The answer of the plaintiffs in error to the amended complaint admits the diversity of citizenship of the parties, the jurisdictional amount in controversy and that the plaintiffs in error were doing business as copartners. It was also admitted that during the months of July and August, 1920, Baker, the defendant in error, delivered to and stored with the plaintiffs in error in Portland, Oregon, 398 barrels of loganberries, amounting to approximately 170,156 pounds; that for a consideration agreed on, the plaintiffs in error agreed to store and to use in respect thereof such ordinary care as prudent persons in the cold storage business were accustomed to use in the storage of such property, and to deliver the same to the defendant in error whenever requested so to do, subject to certain contingencies not here material. The answer further alleged that the berries were of a perishable nature; that before being delivered to the plaintiffs in error at their warehouse in Portland, the berries had been hauled a long distance in warm weather in auto trucks, and that more than one-half of the number of barrels delivered were at the time of delivery fermenting, and some of the barrels were

bursting and blowing up; that upon receipt of the berries, the plaintiffs in error placed them in their cold storage plant and kept them in a condition of refrigeration sufficient to preserve them if in good condition when delivered, except as to the natural deterioration and decay inherent in property of that character; that about the 13th of August, 1920, the defendant in error for the first time suggested to the plaintiffs in error that a temperature of twenty-four degrees above zero be maintained where the berries were stored, and that thereafter the plaintiffs in error maintained such temperature; that the berries at all times had been and were in as good condition as when placed in storage, apart from the natural deterioration inherent in the berries themselves; that if the loganberries were in damaged condition, that fact was due to the negligence of the defendant in error in permitting them to ferment and become damaged prior to the time they were placed in the storage house of the plaintiffs in error.

By way of counterclaim, the plaintiffs in error alleged in substance that in 1920 and 1921, the defendant in error stored the 398 barrels of loganberries referred to and other property with the plaintiffs in error, at the agreed price of $1.15 per barrel for the first month, and 65 cents per barrel per month thereafter; that up to September 30, 1921, storage charges had accrued to the amount of $5811.34, no part of which had been paid. Judgment was prayed against the defendant in error for the amount stated, with interest from September 30, 1921.

This action was brought on or about the 3rd of November, 1921.

The reply put in issue the various affirmative allegations of the answer except the allegation that certain storage charges had not been paid.

On the trial, the Court, over the objections and exceptions of counsel for the plaintiffs in error, permitted the defendant in error to testify in his own behalf in substance that in addition to the 398 barrels mentioned in the amended complaint, he had stored a great many other barrels of loganberries with the plaintiffs in error during the months of July and August, 1920; that of these additional berries, a small quantity had been shipped out by the defendant in error prior to August 1, 1920, to consignees in St. Louis and had arrived in good condition, and no claim had been made against him by the consignees in respect thereof; that several car loads had been shipped out by him after August 1, 1920, and during that month from the warehouse of the plaintiffs in error in Portland, Oregon, to Chicago and other Eastern points, and that these had arrived at the point of destination in bad condition, etc. The berries which were the subject of this testimony were no part of those mentioned in the amended complaint, were in no wise involved in this case and the evidence was directed to their condition after they had been transported during the month of August to a point or points some two thousand miles or more away from the warehouse of the plaintiffs in error.

At the conclusion of the evidence, the plaintiffs in error moved for a directed verdict upon grounds which appear in the assignments of error appearing later in this brief.

POINTS AND AUTHORITIES

I.

Where an action is tried to a jury, the erroneous admission of material evidence is always reversible error, unless it affirmatively appears, beyond doubt, that such error could not have prejudiced the rights of the party complaining thereof.

Mexia v. Oliver, 148 U. S. 664, 37 L. Ed. 602.

United States v. Honolulu Plantation Company, 122 Fed. 581, 583 (C. C. A. 9th Cir.).

Lancaster v. Collins, 115 U. S. 222, 29 L. Ed. 373.

Gilmer v. Higley, 110 U. S. 47, 28 L. Ed. 62.

Smugler Union Mining Co. v. Broderick, 25 Colo. 19, 71 Am. St. Rep. 108, 53 Pac. 170.

Henry v. Colorado Land Co., 10 Colo. App. 23, 51 Pac. 93.

II.

The admission of immaterial evidence in a trial before a jury which has a tendency to divert the attention of the jury from the precise issue involved; to introduce collateral issues; confuse the issues which are to be tried, or excite the prejudice of the jury. is reversible error.

Lucas v. Brooks, 85 U. S. 436, 454; 21 L. Ed. 779, 783.

Neudecker v. Kohlbert, 81 N. Y. 305.

10 R. C. L. 925, 926, 927.

Golden Reward Mining Co. v. Buxton Mining Co., 97 Fed. 413, 416.

III.

It was reversible error to admit the evidence to which plaintiffs in error objected and excepted.

10 R. C. L. 944.
22 Corp. Jur. 750, 751, 752, 753.
Campbell v. Russell, 139 Mass. 278, 1 N. E. 345.
Albany, etc., Co. v. Lundberg, 121 U. S. 451; 30 L. Ed. 982, 985.
Rehberg v. City of New York, 99 N. Y. 632; 2 N. E. 11.
Washington Twp., etc., Co. v. McCormick, 19 Ind. App. 663; 49 N. E. 1085.
Crossen v. Grandy, 42 Ore. 283, 286.
Bullock v. Lake Drummond Canal & Water Co., 43 S. E. 593.
Story v. Nidiffer, 146 Calif. 549; 80 Pac. 692.
Commonwealth v. Middleby, 187 Mass. 342; 73 N. E. 208.

ASSIGNMENTS OF ERROR

In connection with their petition for writ of error, the plaintiffs in error made and filed the following assignments of error:

"Come now the above named defendants appearing by J. F. Boothe, their attorney of record, and say that the judgment and final order of this Court made and entered in the above entitled Court on the 15th day of June, 1922, in favor of the plaintiff above named and against the defendants above named is erroneous and

against the just rights of the defendants, and file herein, together with their petition for Writ of Error from said judgment and order, the following Assignments of Error, which they aver occurred upon the trial of said cause:

(1) The Court erred in admitting evidence over the objections and exceptions of the defendants to the shipping of two or more carloads of loganberries from the defendants' cold storage plant in Portland, Oregon, to Chicago, Illinois, on and after the 4th of August, 1920, and to the testimony brought out before the jury concerning the condition of the loganberries so shipped on their arrival in Chicago.

(2) The Court erred in refusing, over the exception of the defendants, to direct the jury to bring in a verdict in favor of the defendants.

(3) The Court erred in overruling defendants' objections generally to a judgment in favor of the plaintiff for any sum of money and in not entering judgment as requested in their favor for the reason that the testimony properly supports a judgment in favor of the defendants.

(4) The Court erred in failing to enter a judgment for the defendants as requested and in not giving judgment in favor of the defendants for the dismissal of the plaintiff's complaint.

WHEREFORE, the said defendants and plaintiffs in error pray that said judgment of the District Court be reversed, with directions to the District Court to enter judgment in favor of the defendants."

In connection with consideration of paragraph (1) of the foregoing assignments of error, the following is quoted from the bill of exceptions:

"In support of the plaintiff's case and in order to show the damaged condition of the 398 barrels of loganberries, the subject of this action, the plaintiff, H. A. Baker, was called as a witness and was asked the following question:

'Now, what did you do toward attempting to save the product after this fermentation had been evident in it? What I mean is, did you sell it or undertake to ship it?' To which the witness answered: 'Why, we had then in transit five or six cars, I think four or five cars—five cars, we will say, that had been shipped out between the first of August, and when the difficulty arose, we will say the sixteenth of August. One of the cars that were shipped into Chicago——'

"At this point of the testimony the defendants, by their attorney, stated: 'Your Honor, I object to that, to this answer, and move to have it stricken out. That has nothing to do with these barrels that are in question. What we had shipped to Chicago had nothing to do with this, these particular goods we are dealing with, these 398 barrels that he says were in cold storage at that time.'

"Counsel for the plaintiff then stated: 'The fact of the matter is, Your Honor, it is our position in this case that the same treatment was given to all of the barrels as to those that were shipped out prior to about the first of August. I think there were about two cars which went out prior to the first of August. It was after the

first of August that the temperature went up to thirty-six degrees and stayed there some time, and it is our notion about it that the same thing happened, substantially, to all of those barrels of berries that were subject to that rise in temperature. My idea about it is that berries that were subjected to that, that went East and arrived in bad order are in just the same shape as these are here now in bad order.'

"The Court: 'You are not claiming—'

"Mr. Spenser: 'We are not claiming any damages for those that went East.'

"The Court: 'They were in there at the same time. He may answer.'

"Mr. Spenser: 'We are not claiming any damages to those that went East at all, because they were sold to other people.'

"Mr. Boothe: "Note an exception.'

"The witness then answered: 'The car that was shipped to Chicago to one of our buyers about the fourth of August arrived there with about twenty-nine barrels in bad order; it was so reported. Another car that was shipped, I think about four or five days later than that, arrived there with about fifty and sixty per cent; I understand there was about one hundred barrels to a car, ran from ninety-nine to one hundred and five, and the second there was about fifty or sixty per cent that arrived in bad condition. The third car, which went out a few days later than that, probably three or four days, perhaps only two or three days, that time, arrived all in bad condition and those that were shipped arrived after that—between that time and when I stopped them, when

I found out the actual condition—arrived in bad order excepting those two cars I have just mentioned, when a portion of that was saved, showing the progress of the fermentation.

"Question: 'You shipped, as I understand your earlier statement, two cars prior to August first?'

"Answer: 'Two cars were shipped to St. Louis, containing one hundred and five barrels each, which arrived in good condition.'

"Question: 'No claim was made against you or anybody else as to that?'

"Answer: 'No, sir.'

"Question: 'But as to the barrels that were in there on August first and were shipped out after that date, or were put in after that date and subsequently shipped out, what is the fact as to whether or not claims have been made against you on account of the fermented condition—bad condition?'

"Mr. Boothe: 'I object to that, Your Honor. Those goods were shipped a long ways in refrigerator cars, probably three or four weeks reaching their destination.'

"The Court: 'I think it is a circumstance; whatever the jury thinks it is worth, of course.'

"Answer: 'Why, most of them arrived in bad condition, excepting these I have just mentioned, the two cars.'

"To all of which testimony the defendants by their attorney objected, and excepted to the rulings of the Court in permitting the same to be given, and an exception was allowed.

In connection with consideration of assignments of error (2), (3) and (4), the following is quoted from the bill of exceptions:

"At the conclusion of the testimony the defendants, by their attorney, requested the Court to instruct the jury to bring in a verdict in favor of the defendants for the following reasons: The testimony in this cause shows that many of the barrels of loganberries were in a fermenting and damaged condition at the time they were placed in the cold storage plant of the defendants. That the burden of proof is always on the plaintiff to show negligence on the part of the defendants which caused damage to the goods, if any. That the defendants, having overcome by their evidence any presumption of negligence on their part and having produced testimony to the effect that the said 398 barrels of loganberries were in a damaged condition when placed in the cold storage plant of the defendants, it became necessary for the plaintiff to then go forward with the evidence and still maintain the burden of proof in order to charge the defendants with negligence. That if the said loganberries were delivered to the defendants in a damaged condition and were still further damaged by the acts of the defendants, it was the duty of the plaintiff to show the value of the goods when placed in cold storage and the value of the goods after they were further damaged by the acts of the defendants. That no such proof having been offered by the plaintiff, the defendants were entitled to a directed verdict in their favor, which the Court refused. To the refusal of the Court in so directing the jury, the defendants by their counsel duly excepted and an exception was allowed."

ARGUMENT

Reversible error was committed in the admission of evidence.

1. The rule is well settled in this Court, and in the Federal Courts generally that, in a trial before a jury it is reversible error to admit evidence which should have been excluded, unless it affirmatively appears, beyond doubt, that the error was without prejudice to the rights of the party against whom it was committed.

The rule was stated by this Court, with ample citation of authority, in U. S. vs. Honolulu Plantation Co., 122 Fed. 581, 583. This was an action brought by the United States to condemn certain land on Pearl Harbor, Hawaii. The defendant was permitted, over the objections of the plaintiff, to give evidence as to the maximum capacity of its pumping plant and the size of its sugarmill upon other properties, and the expenditures in connection therewith. The pumping plant and the sugar mill were not located upon the tract sought to be condemned, but it was contended that the evidence had some relevancy because it tended to show that the defendant was equipped to operate the tract which the United States was seeking to condemn. This Court held that these matters had no proper connection with the value of the lands the government sought to take, but that they might have the effect of enhancing the value of the land in the minds of the jury. In reversing the judgment entered upon the verdict this Court said:

> "Material evidence erroneously admitted in a trial before a jury is always reversible error, unless

it can be properly said that such admission was, without doubt, without injury."

In Mexia vs. Oliver, 148 U. S. 664, 673 (37 L. Ed. 602, 606), the Supreme Court reversed the judgment of the lower Court for the reason that evidence had been erroneously admitted, and say:

"We cannot say that these errors were immaterial, as it does not appear, beyond doubt, that they were errors which could not prejudice the rights of the plaintiff."

In Gilmer vs. Higley, 110 U. S. 47 (28 L. Ed. 62, 63), the Court, in referring to the rule, said:

"The farthest any Court has gone has been to hold, that when such Court can say affirmatively that the error worked no injury to the party appealing, it will be disregarded. This Court in Deery vs. Cray, 5 Wall. 807, 72 U. S. 657, used this language: 'Wherever the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.' "

Additional authorities to the same effect are collected under Point I of Points and Authorities.

2. The same result is reached and the same rule applied, even though the evidence be immaterial. The Supreme Court of the United States, in Lucas vs. Brooks, 85 U. S. 436 (21 L. Ed. 779, 783), recognized and applied this rule, and observed:

"A judge well performs his duty when he guards the jury against having their attention diverted from the real issue by the introduction of immaterial evidence."

The Circuit Court of Appeals of the Eighth Circuit, in Golden Reward Mining Co. vs. Buxton Mining Co., 97 Fed. 416, discussing the rule, among other things, said:

"As a general rule any evidence is admissible which has a reasonable tendency to establish a material fact in controversy, provided the evidence is not of a hearsay character or otherwise incompetent. Ins. Co. vs. Weide, 11 Wall. 438, 440. If testimony is relevant to an issue it is generally admissible and the courts will not ordinarily consider its weight but will leave that question to be determined by the jury. This rule, however, is subject to the important qualification that testimony which does not have some tendency to establish a material fact may be rejected by a trial judge, and it should be rejected, when its admission will have a tendency to divert the attention of the jury from the precise issues involved in the case, and protract the trial beyond reasonable limits. This limitation of the general rule, requiring all relevant testimony to be admitted, to which we have last alluded, is not only reasonable in itself, but it is well supported by the authorities."

For additional authorities see Point II of Points and Authorities.

3. The evidence objected to is set out on earlier pages of this brief in connection with the Assignments of Error. (See also Trans. pp.——.) Before discussing whether, in the light of the authorities, this evidence was admissible, the evidence itself, its prejudicial nature, and its setting in the record will be briefly examined and discussed.

Mr. Baker was the plaintiff in the court below and is the defendant in error here. He recovered the judgment which is sought to be reversed on the writ of error to this Court. The evidence deemed inadmissible and prejudicial was given by him upon his direct examination. Preliminarily it will be observed that this action was tried on an amended complaint, answer thereto and reply. The amended complaint appears at pages —— of the transcript. In this amended complaint the defendant in error, Mr. Baker, alleged that he had stored with the plaintiffs in error, in their warehouse in Portland, Oregon, in the months of July and August, 1920, a specified quantity of loganberries, to-wit, 398 barrels, containing 170-156 pounds; that through the negligence of the plaintiffs in error these berries had deteriorated and become worthless and that he was damaged to the full extent of the market value of the berries in August, 1920. There is no allegation or suggestion in the amended complaint that any berries other than the 398 barrels had been delivered by Baker to the plaintiffs in error in July and August, 1920, or at any other time, and there was no issue made by the pleadings or involved, either directly or indirectly, in the case, as to the delivery by Baker to the plaintiffs in error of any

other berries at any time, or as to any damage to other berries delivered to the plaintiffs in error by him, or claims made against him by parties to whom he had shipped other berries that had been stored by him with the plaintiffs in error.

The evidence of Mr. Baker clearly locates him on the Pacific Coast during the months of July and August, 1920. He testified that on July 15, 1920, he wrote a letter from Tacoma, Washington, to the plaintiffs in error (Trans., p. —) and on July 31, according to his own testimony he was in Portland (Trans. p. —). On August 14 he was at Bellingham, Washington (Trans, p. —); on August 16 he telegraphed from Bellingham, Washington, to the plaintiffs in error. On August 20 he was in Portland (Trans. p. —). On the 29th or 30th of August he was again in Portland (Trans. p. —).

The barrels of loganberries which are involved in this case were in Portland during all of this time. They were delivered to the warehouse of the plaintiffs in error, according to the allegations of the amended complaint, during the months of July and August, 1920. Thereafter they continued to remain in the warehouse. Over the objection and exception of counsel for the plaintiffs in error, Mr. Baker, defendant in error, was permitted to testify that between the first of August, and, say, about the sixteenth of the same month, he shipped three cars of berries from the warehouse of the plaintiffs in error in Portland; that one car shipped to Chicago, to one of his buyers, about the fourth of August, arrived there with about 29 barrels in bad order, according to

the reports he received; that another car, which he claims to have shipped four or five days later, arrived there with between fifty and sixty per cent in bad order, and a third car, which went out still a few days later, arrived all in bad condition; and that all that were shipped after that arrived in bad order. He was also permitted to testify that as to two cars shipped to St. Louis prior to August first, 1920, and which he says arrived in good condition, no claim had been made against him, presumably by the buyers. The plain inference from this last statement was that claims had been made against him on account of the alleged bad condition of the berries which he shipped to Chicago and other places after August first. (Trans. p. —.)

We have here, then, admitted for the consideration of the jury, evidence of the defendant in error himself of the alleged bad condition of berries, other than those involved in this action, upon or after their arrivel in Chicago and other eastern points. These berries were shipped from Portland in August, that is during the warm summer weather. They were transported a distance of two thousand miles or more by railroad. The witness who gave the testimony, that is the defendant in error, was on the Pacific Coast during the time these shipments were made, a fact which appeared in the record when the evidence objected to was admitted, because he had previously given testimony open to no other construction, as already pointed out. The questions were directed to the condition of the berries upon their arrival in Chicago and other eastern points during a period of time when the witness was out on the Pacific

Coast. This testimony laid before the jury the claim of the defendant in error that he had sustained losses vastly in excess of what he was suing for and clearly suggested to the jury that sundry claims had been made against him by persons and concerns who had purchased berries from him because of the alleged bad condition in which they arrived. If the evidence was inadmissible, it cannot be said, beyond a doubt, that it was not prejudicial. It was evidence of a character that manifestly would divert the minds of the jury from the case before them, confuse the issues, and tend to excite prejudice against the plaintiffs in error.

Now, the theory upon which counsel for defendant in error pressed upon the Court the admissibility of the evidence, and adopted by the trial court, was that the berries which had been shipped to Chicago and other eastern points in the summer of 1920 had been placed in the warehouse of the plaintiffs in error in July and August, 1920, that is during the same months as the berries involved in this case; that the defendant in error, although on the Pacific Coast at the time the shipments were made, might properly testify as to the condition of the shipments when, or some time after, they arrived at Chicago or other eastern points of destination from reports which he received in regard to such matters; and that the condition of the berries shipped from Portland in August, 1920, two thousand miles by rail in the warm summer weather when, or some time after, they arrived at Chicago, or other eastern points, would have a logical tendency to prove that the 398 barrels involved in this case, and which had remained in the warehouse of the

plaintiffs in error at all times after they had been placed there in July and August of 1920, had been damaged through the negligence of the plaintiffs in error. We think the mere statement of the theory makes clear its unsoundness.

> "For the purpose of establishing a particular condition of things it is not permissible, according to fundamental principles, to show a condition at other places than the one in question—at any rate if such places are so remote that difference may exist between them and the place in question."
>
> 10 R. C. L. 944.

> "Evidence that a fact did or did not exist or occur at a particular time, is not admissible to show that another fact or event did or did not exist, or occur, at another time, unless the two facts or occurrences are connected in some special way, indicating the relevancy beyond mere similarity in certain particulars."
>
> 22 Corp. Jur. 750.

> "Evidence of similar occurrences is admitted where it appears that all the essential physical conditions on two occasions were identical, for under such circumstances the observed uniformity of nature raises an inference that like causes will produce like results, even though there may be some dissimilarity of conditions in respect to a matter which cannot reasonably be expected to have affected the result. On like principles, other occurrences have

been deemed relevant where the essential conditions are similar, although the law of uniformity in action underlying the relevancy is not natural but legal. The burden rests upon the party offering the evidence to satisfy the court that the necessary similarity of conditions exists and in the absence of such a showing the evidence will be rejected."

22 Corp. Jur. 751-752.

These principles are fundamental. They have been applied many times by the Courts.

There was an essential dissimilarity in the conditions surrounding the handling and shipment of the berries that went to Chicago and other eastern points, and the conditions surrounding the 398 barrels involved in this case. In the case of the latter they remained in the warehouse. One of the issues involved in the pleadings and evidence was whether or not these particular 398 barrels were or were not in a damaged condition when they were placed in the warehouse. The objectionable evidence was directed to proof of the condition of the berries shipped to Chicago and other eastern points at the time, or some time after, they arrived at destination, after the expiration of perhaps one, two or three weeks and after being transported two thousand miles or more in hot weather. This evidence must have been offered for the purpose of permitting the jury to draw an inference therefrom that, because the berries shipped east were found to be in a bad conditions after they had arrived at eastern points, and some time after they had left the warehouse of the plaintiffs in error, this condition

must have been due to the negligence of the plaintiffs in error, and from this inference draw a further inference that the alleged damaged condition of the berries involved in this case was also due to the negligence of the plaintiffs in error; thus piling inference upon inference as a basis for a conclusion or verdict.

The rule we invoke has been applied in a variety of cases. In the case of Campbell vs. Russell, 139 Mass. 278, 1 N. E. 345, the defense was that the work on a contract for the construction of a house was done in an unskillful and unworkmanlike manner. The defendant offered to show that in a house similar to the one in controversy, planned by the same architect, and in which some of the timbers and spans were the same and some different, the timbers had not sagged and the floors had not settled. In holding this evidence inadmissible the Court said:

> "The controversy between the parties related to the house built by the plaintiff and not to another house. What happened to another house would not aid the jury unless it was shown that the two houses were identical and subject to the same forces and conditions."

In the case of Albany & Renssellaer etc. Co. vs. Lundberg, 121 U. S. 451 (30 L. Ed 982, 985), the rule was applied, resulting in the reversal of the judgment of the Court below. It was an action for damages for the refusal of the defendant to accept Swedish pig iron tendered under a contract. The defense was that the pig iron tendered contained a greater percentage of

phosphorus than that contracted for. Evidence was admitted, over objection, tending to prove the percentage of phosphorus contained in other pig iron from the same concern and made in the same furnace in previous years, without showing identical quality and conditions. The Supreme Court of the United States held that this evidence was irrelevant and incompetent and that it manifestly tended to prejudice the rights of the defendant with the jury.

Rehberg vs. City of New York, 99 N. Y. 632, 2 N. E. 11, was an action for damages alleged to have occurred through the falling of a pile of brick. Evidence was offered upon the trial for the purpose of comparing and contrasting the pile of brick in question with other somewhat similar piles of brick. This evidence was held to be inadmissible for a number of reasons, among others, that the proof failed to disclose that the other piles were in every essential respect identical with the one involved in the case. Speaking of the evidence offered the Court said:

> "It would tend to divert the attention of the jury from the real issue as to the negligence of the city in allowing the construction and maintenance of the pile in question."

Washington Township Farmers etc. Co. vs. McCormick, 19 Ind. App. 663, 49 N. E. 1085 was an action between a gas company and a consumer, and the issue was whether or not the gas company had furnished sufficient gas during a certain period to properly heat and light the residence of the consumer. The consumer was

permitted by the trial court to call a number of his neighbors, who lived on farms in the same neighborhood, to testify that during the period involved in the case the gas company had not furnished them with a sufficient quantity of gas for heat and light. It was not shown that all of the conditions and physical facts in respect of supplying of gas to the neighbors were identical with those existing in relation to the consumer who was one of the litigants. This was held to be error for which the judgment was reversed. The opinion contains an illuminating discussion of the rule, with citation of a number of cases.

Other cases in which the rule was applied are cited under Point III of Points and Authorities.

It is respectfully submitted that the judgment should be reversed and the case remanded for a new trial.

J. F. Boothe,
Attorney for Plaintiffs in Error.

Clark, Middleton, Clark & Skulason,
of Counsel.